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No. 85-1096

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VICTOR H. VAN SANT,

Petitioner

v.

UNITED STATES POSTAL SERVICE, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner's Reply Brief

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Respondents' Memorandum in Opposition does not challenge the first of two key determinations made below: that petitioner was improperly reduced-in-force and separated from federal service in 1971 at a time when employees of another agency

(the Army Corps of Engineers) on long "details" not properly authorized (Petition p. 7) to the Postal Service took over petitioner's specialized tasks. In affirming, the Court of Appeals noted (A4) that the District Court "discerned" that the underlying "reality" constituted a "transfer of function" within the meaning of the Veterans' Preference Act of 1944, 5 U.S.C. §3503(a) (Appendix B2), under which a veteran employed in such a transferred function is to be transferred to the "receiving agency". It is a subsequent determination below and the relief denied that is disputed.

In a second determination, which respondents defend, the District Court established a substitute date for petitioner's RIF Notice, without further agency action, notice, or decision. The District Court ordered Van Sant to be treated as reduced in force by the Postal

Service effective retroactively to a "notice" date 102 days later, December 7, 1971 (A25-26).1/ In a brief explanation of this second determination, for which no precedent or authority was cited, the District Court listed three factual circumstances said to exist as of December 7, 1971.2/ The Court of Appeals also affirmed this determination, supplying no additional explanation or authority.

Respondents' Opposition argues that the District Court's second determination was within its power, and did not deprive petitioner of back pay and reinstatement rights on three invalid grounds, as follows:

1/ The Court failed to specify an actual release date. Respondents' Memorandum at p.3 attempts to exorcise the serious vagueness of the order by assuming what the court "intended".

2/ Specifically, that by December 7, 1971, "neither the plaintiff's position nor his former task was continued and ... the detailees were no longer in the plaintiff's competitive area" (A16).

1. Respondents mistakenly argue that decisions of this and other federal courts bearing on the Back Pay Act of 1966 construe its mandatory back pay provisions as "discretionary". Respondents boldly assert that Van Sant's claim to an unlawful deprivation of back pay under the Back Pay Act of 1966 (Appendix B3) by the relief ordered below is "frivolous" (p. 4); and that such an award would be a "windfall" to Van Sant (id.), placing him in a "better position than he would have occupied had an erroneous personnel action never taken place," emp. sup., citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (id.). To support their contention that Back Pay Act relief is discretionary, respondents cite Kozak v. U.S., 458 F.2d 39 (Ct.Cl. 1972) (id.).

Respondents' contentions are neither explained nor sustained by Albemarle Paper or Kozak. Albemarle Paper involved Title

VII of the Civil Rights Act of 1964, as amended.3/ Yet despite the openly discretionary back pay wording of Title VII, this Court concluded that Congress intended that a back pay award to remove the "effects" of a violation (p. 418-419) normally should be made to effectuate Title VII public policy purposes "of eradicating discrimination ... and making persons whole for injuries suffered" (p. 421). The court's invocation of public policy and "the 'make whole' purposes of Title VII" (p. 418-421), is relevant a fortiori to the comparable public policy and "make whole" purposes revealed in the legislative history of the Back Pay Act of 1966 (Petition, p. 27-29, 34).

3/ The pertinent language read: "If the court finds respondent has intentionally engaged in ... an unlawful employment practice ... the court may ... order ... affirmative action ... which may include ... pack pay ..." (at p. 415, ft. 9).

A fortiori because Congress made the "make whole" back pay provisions of the 1966 Act mandatory.

The 1966 Act provides that an employee found to have been separated through

> "[a]n unjustified or unwarranted personnel action ... is entitled, on correction of the personnel action, to receive for the period for which the personnel action is in effect (1) an amount equal to all ... of the pay ... the employee normally would have earned or received," less interim outside earnings. (5 U.S.C. §5596, see B3-4)

Congress knew when the 1966 Act was enacted that this Court had held in Service v. Dulles, 354 U.S. 363, and Vitarelli v. Seaton, 359 U.S. 16, that the separation of a federal employee accomplished in violation of law or binding regulations was, for reasons of public policy, to be treated as a nullity (Petition p. 22-29). This was held in Vitarelli and thereafter to mean that the employee legally continues as if on the

rolls of the agency until, after restoration to duty, proper personnel measures are followed (Petition p. 25, 30-32, 34-36). Thus, the key phrase in the 1966 Act requiring back pay for "the period for which the [unjustified] personnel action is in effect" was known to mean then, and has always meant, until the "void" character of the personnel action ceases, which normally requires reinstatement. Attempts at a substitute judicial order based on the underlying merits of a separation action found to be invalid under binding law or regulations have been repeatedly rejected. This was the holding in Service (id. p. 23), and has been consistently followed in a long progeny of cases (id. 34-36). Respondents' new attempt to dismiss 30 years of jurisprudence with a case-empty wave of the hand (Opposition p.4, footnote 3) cannot fly.

In an effort to produce one case for

the extreme proposition that back pay for wrongfully dismissed federal employees can be discretionarily limited, respondents cite the Court of Claims' decision in Kozak v. U.S., supra (Opposition p. 4). Kozak is represented as holding that "the employee was entitled to back pay only until such time as the position to which the employee should have been transferred was abolished", emp. sup. (id., ft.2). But respondents entirely misrepresent Kozak. Kozak involved a non-career employee with retention rights "subordinated to ... employees on ... probational status and ... limited to his own division," emp. sup. (458 F.2d 40, ft.2). After Kozak was improperly riffed his entire division was abolished (p. 41-42). The court held that plaintiff was entitled to back pay up to the date "the entire Aerospace Technology Division was abolished" since his "'bumping rights' as

an indefinite status employee were limited to that division" (id.).

Van Sant in sharp contrast is a career, fully-tenured, veteran-status employee with extensive retention rights. Only if Van Sant's entire agency were abolished with no continuation of his functions by any agency could his legal rights to further federal employment be extinguished under the reasoning in Kozak.

Respondents have clearly failed to show how the December 7, 1971 order below can be reconciled with Van Sant's mandatory entitlement to back pay under the 1966 Act and decisions of this Court.

2. Respondents deny Van Sant is entitled to reinstatement, based on untenable reasoning. Although this Court directed reinstatement in Vitarelli, and the Back Pay Act of 1966 operates to require the reinstatement of a wrongfully separated federal employee (para. 1

above), and although the Veterans' Preference Act directs continuing employment (see p.2 above), respondents also boldly assert that Van Sant is "clearly not entitled to reinstatement with the Postal Service (p. 3), nor the Corps of Engineers (p. 4), offering non-case-supported contentions.

Vis-a-vis the Postal Service respondents argument is that the reviewing bodies below "agreed" that petitioner's "job" (sic) was "validly abolished in 1971," and held there was "'no place for an "architect" with the [petitioner's] credentials in the reorganized Postal Service'" (p. 3). The first leg of this argument fails to summarize the decisions below correctly. It was determined below that petitioner's "job" (in distinction to his "position") was <u>not</u> abolished, that it was <u>taken over</u> by COE detailees, making Van Sant's release unlawful under the

Veterans' Preference Act.

The second leg, that it is somehow consequential that the Postal Service "abolished" all "positions" labeled "architect" positions, is meaningless. The rights of career federal employees to continued government service are not controlled by position labels (see, e.g. A69). Inter alia, there are statutory rights (para. 1 above), notice rights (Petition p. 8, ft.1), and assignment rights to positions relating to their underlying duties and functions (id. p. 20, ft.6). This is why Civil Service rules require carefully conducted dual rounds of competition for the jobs remaining after a RIF occurs (Petition p. 19).

Respondents imply, deceptively, that Van Sant had already received all due consideration for other positions in the Postal Service when he was reached for release on August 27, 1971 (Memorandum p.

1,2). (Even if he had, this would not defeat Van Sant's right to reinstatement which is based on statutory provisions and the public policy enunciated by this Court in Service and Vitarelli). But respondents' implication is false.

The MSPB found that a reassignment of Van Sant's duties to other Postal Service personnel occurred after the establishment of a reorganized Engineering Branch that itself took place "following the appellant's separation" (A50, A52). Since three COE detailees were still in Van Sant's job when he was separated (A53-54), this finding is undoubtedly true. Van Sant never received consideration for his ability to perform drastically revised position duties within his agency for which he was expertly qualified. (Note Petition p. 9 discussing false Postal Service advice to CSC that it had not reassigned Van Sant's duties; this dere-

liction renders invalid the CSC conclusions in 1972 regarding Van Sant's lack of bumping rights to pre-reassignment positions).

Vis-a-vis its contention that Van Sant can also have no reinstatement entitlement to the Corps of Engineers, respondents say only that "each tribunal rejected petitioner's claim that he should have been transferred to the Corps" (p. 4); it is explained: the "'design architects who were transferred to the [Corps were] professional architects concerned with ... tasks not within Van Sant's responsibiilty or expertise'" (id.). These contentions establish nothing.

The District Court and the Court of Appeals did not "reject" petitioner's claim of entitlement to a transfer to the Corps, but <u>on the contrary</u> found that Van Sant's transfer rights under 5 U.S.C. §3503(a) were <u>violated</u>. What the courts

below failed to do was to implement their finding of a §3503 violation in a way that would meaningfully protect the mandatory transfer right for veterans established by Congress. Respondents seek to travel on what is a facially evident flaw in the decisions below. As the Petition explains with unrebutted cogent citations at p. 38-41, only current reinstatement of Van Sant can properly cure the violation of his mandatory transfer rights.

Nor does it help respondents to disparage Van Sant as not a "professional" "design" architect. Since it has been determined that Corps employees took over, de facto, Van Sant's "planning" function, it follows necessarily that Van Sant had a statutory right to be transferred to the receiving agency, not implemented below.4/

4/ The Corps was served herein, did not object to service, and has been represented below by Postal Service counsel.

(footnote continued)

3. Respondents mistakenly argue that the District Court's substitute separation Notice of December 7, 1971, can be reconciled with SEC v. Chenery Corp.

Respondents admit that under SEC v. Chenery Corp., 332 U.S. 194, a reviewing court "'must judge the propriety of [an agency] action solely on the grounds invoked by the agency'" (p. 5). And they concede that the District Court's third-mentioned reason for ordering a December 7, 1971, Notice date for Van Sant's release that COE detailees "were no longer in the plaintiff's competitive area") was a judicially-supplied determination not used by the Postal Service when it terminated Van Sant earlier (id.). Never-

(footnote 4 continued)

Petitioner believes that reinstatement to the Postal Service, however, is the more appropriate remedy, since that is where Van Sant's function is now located, see Petition p. 11, ft.3.

theless, respondents again boldly argue that this new rationale by the District Court can be ignored (id.). They cite to a footnote remark by the D.C. Circuit on reversing the MSPB for supplying an unauthorized rationale in a RIF case, Horne v. MSPB, 684 F.2d 155, 158N.4 (1982), that it would be "wasteful" to send a decision back to an agency "if facts already established make such further action by the agency predetermined" (id. ft. 4). Respondents argument is that the Postal Service and the reviewing courts "stated that petitioner was terminated because his position was abolished and there was no other job that he could perform" (Memorandum p. 5). These "facts" are said to suffice to fit the District Court's December 7 release Notice date within Horne dicta. This reasoning resembles a piece of Swiss cheese.

In the first place, the District Court's third reason for its order is a judicially-supplied factual rationale that introduces an element crucially different from the factual circumstances, and reasons causing the Postal Service to "reach" Van Sant for "release" in August 1971 (for the then circumstances see Petition p.7-8; CSC regulations at B9, B11, B14). The Postal Service in August failed to consider at all that the COE detailees were in Van Sant's competitive area because these irregular details were arranged without Postal Service Management approval, or knowledge (Petition p. 7; admitted at TR Exhibits Vol. II. p. 11-12, 173). Further, as explained in para. 2 above, no consideration was ever given by Postal Service officials (and none ever claimed, Petition p. 14, ft.5) to Van Sant's Civil Service and VPA-protected right to receive job offers to <u>revised</u> positions in the

Postal Service once his duties were reassigned, a reassignment that occurred after Van Sant's release. In short, there are no key "facts already established" in this case that would "predetermine" an agency decision on December 7, 1971, to again reach Van Sant for release. (Not to mention factual circumstances involving all the new and revised positions as of December 1971 that are not even remotely embraced in the record below.) Whatever the agency's reasons for decision-making they would necessarily have to be drastically different from its misinformed decision-making concerning Van Sant on August 27, 1971.

Further, the cases cited in the Horne footnote, and the Horne decision itself, make clear that the conduct of Civil Service reduction-in-force competition rounds are not matters for reviewing courts to conduct with independent ini-

tiative, since Congress has assigned this domain exclusively to agency "discretion". Typically, in Local 833 UAW v. NLRB, 300 F.2d 699, 705 (1962), cited by Horne, the D.C. Circuit held it had no authority to supplant agency discretion to determine whether employee misconduct could be a discharge "for cause" under §10(a) of the NLRA. Only in Chae-Sik Lee v. Kennedy, 294 F.2d 231 (1961) did the D.C. Circuit find further agency action unnecessary where the ultimate facts were indisputable, and the question was one of statutory construction under the Immigration and Nationality Act.

The chief "ultimate fact" that is clear in this case is that the District Court committed a free-wheeling intrusion into personnel matters committed by Congress to exclusive agency discretion when it conducted an unauthorized, retroactive Civil Service competition for Van Sant. As this

Court said plainly in Chenery Corp. a District Court is "powerless" to proceed in this manner (332 U.S. at p. 196).

Conclusion

An indefensible error was committed below when the District Court conducted its own retroactive RIF of petitioner. The order below guts Congressional back pay and veteran-protection statutes and rewrites or ignores decisions of this Court and over 30 years of consistent federal personnel law. To prevent an outrageous injury to public policy and to the integrity of this Court's decisions the Petition herein should be granted. A summary order of reversal would be appropriate (see Petition p. 46-47).

Respectfully submitted,

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March 8, 1986

Certificate of Service

I hereby certify that three copies of the foregoing petition were mailed, first class mail, postage prepaid, this 10th day of March, 1986 to : (a) the Solicitor General, Department of Justice, Washington, D.C. 20530; and (b) counsel of record for defendants, Kevin B. Rachel, Esq., Office of Labor Law, U.S. Postal Service, 475 L'Enfant Plaza, Washington, D.C. 20260-1131.

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